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No. 05-260

In The
Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID-ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

BRIEF AMICI CURIAE FOR THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

KENYA N. WILEY, ESQ.
SOCIETY FOR HUMAN
RESOURCE MANAGEMENT
1800 Duke Street
Alexandria, VA 22314-3499
(703) 535-6026

STEPHEN A. BOKAT, ESQ.
ROBIN S. CONRAD, ESQ.
ELLEN DUNHAM BRYANT, ESQ.
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

TERESE M. CONNERTON, ESQ.*
SCHMELTZER, APTAKER
& SHEPARD, PC
2600 Virginia Avenue, N.W.,
Suite 1000
Washington, DC 20037
(202) 333-8800

*Counsel of Record

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF INTEREST

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management.[1] Representing more than 200,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries. SHRM's membership comprises HR professionals who work for employers that sponsor health plans for their employees.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

This case involves a plan fiduciary's attempt to recover under ERISA the medical expenses advanced by the

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[1] Pursuant to Supreme Court rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members, made a monetary contribution to the preparation or the submission of this brief. The brief is filed with the consent of the parties and copies of the consent letters have been filed with the Clerk.

plan under its subrogation/reimbursement provisions. The court decision will have a direct impact on a substantial number of the members of SHRM and the Chamber. From the largest to the smallest of businesses, those that sponsor health plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA") containing subrogation and reimbursement provisions have a vital interest in the outcome of this case.

SUMMARY OF ARGUMENT

This case involves the extent of equitable relief available to a fiduciary under ERISA §502(a)(3)[2] to enforce the reimbursement and subrogation provisions of an employer-sponsored health plan. The Fourth Circuit (following the lead of the Fifth, Seventh, and Tenth Circuits)[3] has held that a plan fiduciary may seek under ERISA equitable restitution and impose a constructive trust or equitable lien on a portion of the settlement funds that are within the possession and control of a participant. The Sixth and Ninth Circuits have reached the opposite conclusion, finding that the plan fiduciary cannot seek a constructive trust or equitable lien on a participant's settlement proceeds that are held in an identifiable account since the claim simply seeks to enforce a contractual provision in a

[2] 29 U.S.C. §1132(a)(3).

[3] *See Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, et al.*, 354 F.3d 348 (5th Cir. 2003); *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir. 2003).

plan document to require the payment of money which is a classic action at law, not an equitable claim.[4]

The Sixth and Ninth Circuits' rationale must be rejected. The Fourth Circuit decision was properly decided in accordance with Supreme Courts' rulings construing the remedies available under ERISA §502(a)(3). The circumstances of the case warrant the imposition of a constructive trust or equitable lien remedy which was available in the traditional equity courts. The meaning of "appropriate equitable relief" as described by the majority of the Supreme Court embraces the imposition of a constructive trust or equitable lien on monies received from a tortfeasor being held in an account under the control of the participant. The plan fiduciary is seeking an equitable right based on unjust enrichment to some or all of the money held in the account which is derived solely from the participant's state court settlement with the tortfeasor. This right is well recognized in traditional equity courts and is independent of any contractual rights between the parties. Equitable relief is particularly appropriate here because plan fiduciaries do not have a right under ERISA to enforce the terms of the plan through direct recovery from the participant, so there is no adequate remedy at law.

Subrogation and reimbursement provisions are found in, and used by, virtually all insured and self-funded health plans. The denial of the enforcement of subrogation/reimbursement provisions contained in most health plans will result in increased costs for the provision of medical

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[4] *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004); *Westaff (USA) Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002).

benefits to plan participants and beneficiaries. With medical costs already skyrocketing, an adverse ruling in this case will encourage more employers to *not* offer healthcare plans or pass the increased costs onto participants in the plan.

Further, if plan fiduciaries are unable to enforce these subrogation/reimbursement provisions, plan sponsors will amend their plans to eliminate benefits for injuries and illnesses arising out of accidents for which third parties may be liable. In the event that such benefits are not provided, plan participants and beneficiaries will have to either pay medical providers directly for such services or wait to pay medical providers from their recoveries from tortfeasors. This would impose uncertainties and hardships on participants and beneficiaries and result in a less efficient means of paying medical benefits.

Finally, if *Sereboff* is overturned, plan fiduciaries will be forced into state courts to attempt to enforce the plans' subrogation and reimbursement clauses. The result of such efforts will vary depending on the jurisdiction in which the claims are heard, contrary to one of the principal purposes of ERISA which is to promote uniformity in administration of ERISA plans.

In sum, the Fourth Circuit's decision should be upheld. Plan fiduciaries do have a cause of action under ERISA §502(a)(3) for restitution to prevent unjust enrichment by the imposition of a constructive trust or equitable lien on the participant's settlement proceeds held in a separate identifiable account under the participant's actual or constructive control. To hold otherwise would: (1) hinder the enforcement of subrogation/reimbursement provisions; (2) allow plan participants and beneficiaries to

defeat the plan's interest in being reimbursed by the tortfeasor whose actions caused the illness or injury; (3) create an administrative burden for plan fiduciaries by requiring them to go into state court and bring suits against potential liable third parties; (4) encourage plan sponsors to eliminate coverage now extended to participants for their convenience; and (5) increase health plans costs, which may result in discouraging employers to maintain plans or shifting the additional costs to participants and beneficiaries.

ARGUMENT

A. THE REMEDIES OF CONSTRUCTIVE TRUST AND EQUITABLE LIEN CONSTITUTE APPROPRIATE EQUITABLE RELIEF UNDER ERISA §502(a)(3).

The Supreme Court has interpreted ERISA §502(a)(3) in at least four cases. In *Mertens v. Hewitt*,[5] the participants' cause of action against the nonfiduciary was maintained under §502(a)(3) to obtain "other appropriate equitable relief" to redress fiduciary violations of ERISA. The Court held that ERISA does not authorize suits for money damages against the nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. The Court opined that the relief sought (*i.e.*, monetary damages against the nonfiduciary for losses to the plan) was *not* a remedy *traditionally viewed as equitable*, since money damages are the classic form of legal relief. Further, the Court declined to rule that *all* relief available for

[5] 508 U.S. 248, 254-57 (1993).

breach of trust that could have been obtained in a court of equity was available under §502(a)(3). To read the statute otherwise would "render the modifier – equitable – as superfluous."[6] The Court noted that at common law, equity courts could establish legal rights and grant legal remedies for breach of trust, as well as grant traditional equitable relief (such as injunction and restitution).

The second case addressing the parameters of §502(a)(3) relief is *Varity Corp. v. Howe*,[7] wherein the Court agreed that a claim for individual relief against fiduciaries to redress breaches of fiduciary duties could be maintained under §502(a)(3). In so holding, the court described the language in §§502(a)(3) and 502(a)(5) as two "catchalls," acting as a "safety net" and "offering appropriate equitable relief for injuries caused by violations that §502 does not elsewhere adequately remedy."[8] The Court did not elaborate, however, on what relief would be available to the individual plaintiffs to redress the breaches of fiduciary duty.

In *Harris Trust and Savings Bank v. Salomon Smith Barney*,[9] the Court permitted a cause of action under §502(a)(3) against a nonfiduciary party-in-interest broker to obtain "appropriate equitable relief" to redress a violation of the prohibited transaction rules of ERISA. The Court found that a §502(a)(3) cause of action was appropriate to redress violations or enforce any provisions of ERISA or an

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[6] *Id.* at 258.

[7] 516 U.S. 489 (1996).

[8] *Id.* at 512.

[9] 530 U.S. 238 (2000).

ERISA plan and the only limit in §502(a)(3) is the "appropriate equitable relief" caveat. In so finding, the Court relied on the common law of trusts, which allowed an action for restitution of property or disgorgement of proceeds and profits through the imposition of a constructive trust in situations where property was obtained by another by fraud or other means which would render it unconscionable for the holder of legal title to retain and enjoy the beneficial interests.[10]

The final case, which is a prequel to the case below, is *Great West Life & Annuity Insurance Co. v. Knudson*.[11] The court declined to allow a plan fiduciary to enforce the plan's subrogation and reimbursement provision against a plan participant under ERISA §502(a)(3). The court held that: (1) "equitable relief" in §502(a)(3) refers only to those categories of relief that were *typically available in equity*;[12] (2) "an injunction to compel the payment of money past due under a contract or specific performance of past due monetary obligation was *not* typically available in equity"[13]; and (3) not all relief characterized as restitution was available in equity – *i.e.*, it is a legal remedy when ordered in a case at law and an equitable remedy when ordered in an equity claim.[14]

The Supreme Court proceeded to provide a framework for courts to determine which type of case it may be.

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[10] *Id.* at 250-51.

[11] 534 U.S. 204 (2002).

[12] *Id.* at 209-10 (*citing Mertens*).

[13] *Id.* at 211.

[14] *Id.* at 212, *citing* Judge Posner's decision in *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994).

Courts were instructed to ascertain *the basis for the claim* and *the nature of the underlying remedies sought.*[15] If plaintiff's claim was to obtain a judgment imposing personal liability on defendant to pay money, it was restitution at law. If, on the other hand, it was an action in the form of a constructive trust or an equitable lien, it was restitution in equity and *a court could order the defendant to transfer title to property or give a security interest to plaintiff in money or property in defendant's possession which in good conscience belonged to Plaintiff.*[16] However, in *Knudson*, the Supreme Court declined to impose a constructive trust or an equitable lien on settlement proceeds because the funds to which the plan fiduciary sought entitlement were not in the participant's possession, but had been placed in a special needs trust and given to the attorney.[17]

The Supreme Court's discussion in *Knudson* delineating the circumstances in which restitution could be characterized as equitable was derived from treatises describing equity actions at the time of the divided bench.[18] In traditional equity courts, where a defendant has gained a benefit that in good conscience belonged to plaintiff, plaintiff could assert a claim for *unjust enrichment* and seek restitution in the form of a constructive trust or

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[15] *Id.* at 213.

[16] *Id.* at 213-14.

[17] *Id* at 214.

[18] *Knudson*, 534 U.S. at 213-14, *citing* 1 D. Dobbs, *Law of Remedies* §4.3(1) at 587-88 (2d ed. 1993), *Restatement of Restitution* §160, cmt. a, at 641-42 (1936); and 1 G. Palmer, *Law of Restitution* §1.4 at 17; §3.7 at 262 (1978).

equitable lien.[19] Plaintiff would seek these remedies to require disgorgement of *specific* real or personal property unjustly held by the defendant. The constructive trust remedy would provide an *in personam* order requiring the defendant to turn over property to a plaintiff.[20] Prior to making the order, the court would decide if restitution was proper, and, if so, would declare the defendant to be a constructive trustee and order him as trustee to transfer the property.[21] Constructive trust may only be had if defendant can be said to possess the property which in good conscience belongs to plaintiff.[22] If the property is sold and the money dissipated, then plaintiff would only have legal relief.[23]

The difference between legal and equitable restitution is the focus of the remedy. Legal restitution is a general claim for money to recoup plaintiff's losses (*i.e.*, plaintiff is seeking a judgment imposing personal liability on defendant for money owed), while equitable restitution is a claim for return of specific property, including money, that in good conscience belongs to plaintiffs.[24] Petitioners even

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[19] *Supra* fn. 17. *See also* 4 J. Pomeroy, *Equity Jurisprudence* §1047 at 101-02 (Symons 5th ed. 1994) (1941) An equitable lien is a special form of constructive trust and would be applied where the plaintiff was not claiming rightful ownership over the entire *res* sought for attachment. The plaintiff receives a security interest in the property *See* 1 D. Dobbs, *Law of Remedies* §4 3 at 249.

[20] 1 D Dobbs, *Law of Remedies* §4 3(2) at 590-91 (2d ed. 1993).

[21] *Id* at 591.

[22] 1 D. Dobbs, *Law of Remedies* §4.3(2) at 242 (1973).

[23] 1 D. Dobbs, *Law of Remedies* §4.3(2) at 591 (2d ed. 1993)

[24] 1 D. Dobbs, *Law of Remedies* §2.6(3) at 157 (2d ed. 1993), *Knudson*, 534 U.S. at 213-14; *Health Costs Controls of Ill v Washington*, 187 F3d 703, 710-11 (7th Cir. 1999) (discussing the differences between legal and equitable restitution).

concede that "a breach of contract may occasionally entitle plaintiff to seek equitable relief, in the form of money."[25]

The Fourth Circuit in *Sereboff* properly found that the basis of the plaintiff's claim and the nature of remedy were equitable. The court upheld the equitable restitution claim finding that plaintiff was seeking the settlement funds which properly belonged to the plan and those funds were specifically identifiable and in the defendants' possession.[26] The court rejected the Ninth and Sixth Circuits' "more restrictive view" of what constituted "other appropriate equitable relief."[27]

Petitioners argue that equitable remedies of constructive trusts and equitable liens are not available because plaintiff was not seeking the return of particular funds that the plan paid to them and that they retain, or the profits that they may have made from the use of those funds, but rather is seeking to recover new money paid to plaintiff by third parties.[28] A constructive trust is not limited to situations where plaintiff is seeking the *res* personally given to defendant, but encompasses property which defendant takes that belongs to plaintiff, even though plaintiff never held title.[29] Petitioners misconceive the property interest that the plan fiduciary was asserting belonged to the plan. The plan fiduciary was not seeking the monies paid to medical providers. Rather, the property

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[25] *See* Petitioners' Brief at *9.

[26] *Mid-Atlantic Medical Services, LLC v. Sereboff*, 407 F.3d 212, 218-19 (4th Cir. 2005).

[27] *Id.* at 219-20, fn. 7 (relying on the reasoning in *Bombardier*, 354 F.3d at 358 n.43 and *Willard*, 393 F.3d at 1125).

[28] *See* Petitioners' Brief at *20-21.

[29] 1 D. Dobbs, *Law of Remedies* §4.3(2) at 590 (2d ed. 1993).

interest in which the plan claimed to have a beneficial interest was the settlement monies received from a third party or insurer. This is exactly what the plan subrogation reimbursement provision provided.[30] When petitioners accepted the payment of medical expenses relating to their accident and then sued the tortfeasor in state court, they agreed to hold the recovery (or a portion thereof) in trust for Respondent MAMSI. Thus, the funds which the Fourth Circuit awarded to the plan were clearly "traceable" and recoverable through the imposition of a constructive trust or equitable lien.[31]

Moreover, this equitable interest does not rest only on the contractual relations of the parties, but on the court's determination that "in good conscience," the settlement funds belonged to the plan to prevent unjust enrichment. The plan fiduciary agreed to make payment in reliance on petitioners' misrepresentation that the funds petitioners received from the tortfeasor would be held for the benefit of the plan.

Petitioners also argue that the equitable remedies cannot be granted in this case because the plan fiduciary has an adequate legal remedy.[32] Although equity courts

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[30] *See* Joint Appendix Exhibit 1 to Joint Stipulation of Facts at 75.

[31] *See Health Costs Controls of Ill. v. Washington*, 187 F.3d at 710-11 (plan fiduciary is seeking a constructive trust in participant's claim to tort settlement held in an escrow account); *Wal-Mart Stores Health and Welfare Plan v. Wells*, 213 F.3d 398, 401 (7th Cir. 2000) (the question is whether the participant or the plan is the beneficial owner of the monies held in a lawyer's escrow).

[32] *See* Petitioners' Brief at *23. Petitioners assert that the plan administrator could have directly intervened as a subrogee in the Sereboffs' state court action to collect the monies owed to it. *See* Petitioner's Brief at *21, fn. 8. The remedy of subrogation is *equitable*,

(Continued on following page)

would not normally award relief if plaintiff had an adequate remedy, the treatises on remedies indicate that, even when a legal remedy may be available, a plaintiff may maintain an equitable claim if the remedy is more advantageous.[33] In the case below, the Fourth Circuit's affirmation of the equitable remedy of constructive trust or equitable lien was clearly preferable because, under the facts of the case, it was the *only way* the plan fiduciary could obtain monies which in good conscience belong to the plan. Thus, there is no reason to deny the remedy sought

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not legal. *See* 1 D. Dobbs, *Law of Remedies*, §4.3(1) at 587-88 (2d ed. 1993) (listing subrogation as a "major restitutionary remedy in equity"), §4.3(4) at 604 ("subrogation is another equitable remedy in which trading is used to prevent unjust enrichment and to give effective relief to the plaintiff"); *Scholastic Corp v Najah Kassem & Casper & De Toledo LLC*, 389 F. Supp 2d 402, 413 (D. Conn. 2005) (subrogation is a "creature of equity" and is "enforced solely for the purpose of accomplishing the ends of substantial justice"). In *Scholastic Corp.*, the court permitted an employer to proceed with a claim for an equitable lien over funds held in a designated account that had been paid by third party tortfeasors in settlement of litigation over an accident for which the employer paid the injured employee's medical benefits pursuant to its ERISA plan. The court found that the employer had a subrogation right under the terms of the plan to reimbursement of the medical benefits expended by the plan in the event that the employees recovered against a third party at fault. *See id.* at 412. The court further found that such a right was inherently equitable, and that an action for an equitable lien was a proper vehicle for enforcing the subrogation right independent of any contract action the employer may also be entitled to bring. *See id.* at 412-14.

[33] *See, e.g.*, 1 D. Dobbs, *Law of Remedies* §4 1(1) at 556 §4.3(2) at 595-96 (2d ed. 1993) (some authorities support the view that a claim for a constructive trust may be pursued even if the legal remedy is adequate and even if the trust would yield only money that could be recovered at law); 4 J. Pomeroy, *Equity Jurisprudence* §1047 (Symons 5th ed. 1994) (1941) (constructive trust may be applied "wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer").

by the plan administrator because ERISA §502 does not elsewhere provide an adequate remedy.

B. REIMBURSEMENT PROVISIONS SERVE IMPORTANT PURPOSES WHICH BENEFIT EMPLOYERS, PARTICIPANTS AND BENEFICIARIES.

Subrogation/reimbursement provisions are found exclusively in, and used by, both insured and self-funded health plans. They are cost-shifting measures. Reimbursement and subrogation provisions operate very differently, but essentially serve the same purpose (*i.e.*, to prevent unjust enrichment). Reimbursement provisions require the participant or beneficiary to reimburse the plan for medical expenses paid by the plan in the event there is a recovery for the same injuries from a responsible third party through judgment or settlement. Subrogation, on the other hand, allows the plan to step in the shoes of the injured participant and sue the tortfeasor directly. Subrogation is a more expensive alternative for plan fiduciaries since the plans would have the burden of suing the tortfeasor and proving the liability for the injury.[34]

Subrogation/reimbursement provisions are similar to other cost-shifting measures commonly found in health plans. For example, plan administrators have to determine benefits in dual or triple coverage situations ("coordination of benefits") and also coordinate with Medicare

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[34] *See* R. Goff & G. Jones, *The Law of Restitution* §3-004 at 1230 (6th ed. 2002); 16 L. Russ, *Couch on Insurance*, §222.22 at 222-13 to 222-14 (3d ed. 2000) (noting distinctions among subrogation, liens and assignments).

under the Medicare Secondary Payer Rules. The purpose for these rules is to shift the costs of the medical expenses on the plans to other persons or entities who are primarily liable for the expenses.

The subrogation/reimbursements provisions (and the other coordination of benefit provisions) serve important goals, including: (1) preventing participants and beneficiaries from retaining recoveries which were meant in part to reimburse for medical expenses already paid by the plan; (2) shifting the costs to the tortfeasor or another responsible party who is primarily liable for those costs; and (3) preventing participants, beneficiaries and others from defeating the plan's recovery of the advanced medical expenses by creatively structuring settlements to foreclosure recovery of those expenses.

When participants bring claims to recover for injuries or illnesses sustained as a result of a liable third party, such claims almost uniformly seek recovery of damages for the medical expenses that the plans have paid or may be obligated to pay to the plaintiffs in the future. When funds are recovered through judgments or settlements, it can reasonably be assumed that they include amounts for all or part of the medical expenses incurred or anticipated to be incurred in the future by the injured participant. Thus, the imposition of a constructive trust or equitable lien on the settlement recoveries prevents double recoveries by participants for medical expenses.

Moreover, another policy underlying the enforcement of subrogation and reimbursement provisions is to assure that the tortfeasors or other responsible parties, rather than the plans, employers, participants and beneficiaries,

would ultimately bear the medical expenses resulting directly from their wrongful conduct.

Allowing enforcement of these provisions would likewise discourage participants through post-settlement maneuvers from attempting to fashion settlement agreements so as to exclude therefrom any recovery for the medical expenses paid by the plans, and for which plaintiffs originally demanded recovery.

Most importantly though, enforcement of subrogation/reimbursement provisions serves to reduce the health plans' and insurers' costs of providing health benefits and, thus, conserve limited plan funds.[35] Unfortunately, even with cost saving measures in place, the skyrocketing costs of employer-sponsored health coverage in this country has resulted in fewer employers extending health coverage and fewer employees being covered.[36]

Millions and potentially billions of dollars are recouped annually by health plans.[37] If this court were to

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[35] *Varity*, 516 U.S. at 497.

[36] The Employer Health Benefits 2005 Annual Survey reports that from 2000 through 2005, average premiums for family coverage increased by 73% (for both insured and self-funded plans) and, in 2005, the average annual premium for a family of four was $10,880.00, which almost equals the full-time earnings of a minimum wage worker. The Henry J. Kaiser Family Foundation & Health Research & Education Trust, *Summary of Findings*, Employer Health Benefits 2005 Annual Survey 1 (2005), *available at* http://www.kff.org/insurance/7315/sections/upload/7316.pdf. Additionally, over the past five years, the percentage of employers offering health benefits have decreased from 69% to 60% and the percentage of workers covered has fallen from 63% to 60%. *See id.*

[37] One of the largest private healthcare claims recovery services in the United States recovered $239.9 million in health claims in 2003. *See Trover Solutions, Inc., Form 10-K (FY 2003)* at 29. Based on the recoveries made by this service, it is estimated that more than $1 billion is recovered annually on behalf of all plans.

hold that §502(a)(3) does not permit enforcement of plan reimbursement/subrogation provisions to recover amounts paid out to participants injured by liable third parties, it will inevitably adversely impact the financial viability of health plans, increase the costs of providing health benefits, and cause employers to: (1) drop coverage altogether; (2) decrease benefits provided to all employees; or (3) pass those increased costs onto workers.

C. IF PLAN REIMBURSEMENT AND SUBROGATION PROVISIONS CANNOT BE ENFORCED, PLAN SPONSORS MAY SIMPLY AMEND PLANS TO EXCLUDE BENEFITS FOR WHICH THIRD PARTIES MAY BE LIABLE.

Petitioners Joel and Marlene Sereboff recovered $750,000 in settlement of a personal injury action against third party tortfeasors for injuries sustained in an automobile accident. The Sereboffs were covered at the time of the accident by MAMSI Life and Health Insurance PPO Plan, and the plan paid nearly $75,000 in medical benefits on behalf of the Sereboffs as a result of the accident. The plan contained a subrogation provision giving MAMSI the right to recover medical benefits paid to participants as a result of any injury caused by a third party. Though MAMSI made a formal demand on the Sereboffs for recognition of the plan's subrogation rights during the settlement process, the Sereboffs refused to comply with the subrogation provision and did not reimburse the plan. The Court of Appeals for the Fourth Circuit affirmed the District Court's award reimbursing the plan out of the monies recovered in settlement of the Sereboff's personal injury action.

Plans provide for the payment of participants' medical expenses relating to illnesses and injuries for which a third party may be liable as a convenience to their participants and to assist in prompt payments to medical providers. If this court overturns the *Sereboff* decision, plan sponsors will amend their health plans to discontinue this accommodation and exclude payments for illnesses or injuries for which third parties may be liable. The employers' decisions regarding the design of the plan itself – *e.g.*, who is entitled to benefits, in what amounts and how the benefits are calculated – are settlor functions.[38] "[E]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans."[39] Indeed, ERISA does not require that an employer provide any particular benefits or any benefits at all.[40] Thus, employers may legitimately, without incurring any fiduciary liability, amend their health plans to exclude the payment of benefits for which a third party may be liable.

Unless the participant is able to prove to the plan fiduciary that the exclusion did not apply, the participant would be primarily responsible for the medical bills. For example, in this case, $74,869.37 of the Sereboffs' medical bills were paid directly by the plan. Likewise, in the

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[38] When employers undertake to adopt, modify or terminate plans, their actions are analogous to settlors of a trust. *See Hughes Aircraft Co v. Jacobsen*, 525 U.S 432, 443-44 (1999); *Lockheed Corp v. Spink*, 517 U.S. 882, 889-90 (1996); *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

[39] *Curtis-Wright*, 514 U.S. at 78 ("ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits").

[40] *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983).

Knudson case, medical bills amounting to $411,157.11 were paid by the insurance plan. If the health plans expressly excluded these benefits, the Sereboffs and the Knudsons would have had to pay the medical bills out of their own pockets.

If a participant was unable (or unwilling) to pay the medical expenses, the expenses would not be paid until he/she was able to recover from the liable third party. Prior to recovery, the unpaid medical providers may bring suits against the participants. This would result in participants being burdened by state court collection actions and providers not being paid in a timely manner, causing even more havoc on the court system.[41] Upholding the *Sereboff* decision and allowing plan fiduciaries to obtain recoupment of monies in limited circumstances will facilitate, rather than impede, the system of claims payments.

D. IF FIDUCIARIES SEEK TO ENFORCE THE PLANS' REIMBURSEMENT AND SUBROGATION PROVISIONS IN STATE COURTS, THEIR CLAIMS MAY BE DENIED AS PREEMPTED BY ERISA OR SUBJECT TO THE VAGARIES OF STATE LAWS.

Whether a plan fiduciary can sue for damages for breach of contract or otherwise seek to enforce the plan's subrogation and reimbursement provisions under state law without running afoul of ERISA's broad preemption

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[41] *See, e.g., McIntyre v. Carpenters Health & Security Trust of Western Washington*, 2006 U.S. Dist. LEXIS 3759 (W.D. Wash. 2006) (participant sued plan and plan administrator requesting an order for payment of claims excluded under plan).

provisions was left open in *Knudson*.[42] Since *Knudson*, the courts' rulings on this issue have been mixed. Some courts have held that state law claims by plan fiduciaries are preempted, even though there may be no available federal remedy.[43] In at least three cases, federal courts have held that participants' state law declaratory actions to determine the rightful ownership of tort recoveries are preempted by ERISA (although the state courts may have concurrent jurisdiction with federal courts to decide them).[44] A number of courts, on the other hand, have entertained state law claims by plan fiduciaries seeking to enforce reimbursement and subrogation plan provisions.[45]

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[42] 534 U.S. at 220

[43] *See, e.g., Infinity Insurance Companies v. Copeland*, 2005 U.S. Dist. LEXIS 30018 at 3 (M.D. Ga. November 18, 2005) (insurer's subrogation claim is based on and arises out of ERISA and, thus, is under the exclusive jurisdiction of federal courts); *Liberty Northwest Insur. Corp. v. Kemp*, 192 Ore. App. 181, 85 P.3d 871 (Ct. App. Ore. 2004) (ERISA preempts the insurer's state common-law breach of contract claim because it references an ERISA plan and interferes with one of Congress's most important objectives in enacting ERISA), *MEBA Medical & Benefits Plan v. Tracey Lago*, 867 So. 2d 1184 (Ct. App. Fla. 2004) (trust's action is preempted because it relies upon state law for alternative enforcement of its claim for reimbursement of benefits); *Board of Trustees of San Diego Electrical Health and Welfare Trust*, 2003 Cal. App. Unpub. LEXIS 2377 (Ct. App. Cal. 2003) (same); *Community Insurance Co. v. Morgan*, 54 Fed. Appx. 828 (6th Cir. 2002) (plan fiduciary's action seeking a declaration under state law of its entitlement of funds based on its subrogation interest is preempted).

[44] *See McIntyre v. Carpenters Health and Security Trust of Western Washington*, 2006 U.S. Dist. LEXIS 3759 (W.D. Wash. 2006), *Liming v. Check Free Services Corp.*, 2005 U.S. Dist. LEXIS 39155 (D. Ariz. 2005); and *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003) (en banc).

[45] *See, e.g., Uber v. TIG Specialty Inc. Co.*, 2003 Mich. App. LEXIS 262 (Ct. App. Mich. 2003) (court held that plan fiduciary could assert a lien on the settlement proceeds recovered in the participant's state law

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If this Court were to reverse *Sereboff*, it is uncertain whether plan fiduciaries could maintain state court actions to enforce the plan's subrogation and reimbursement rights. If they cannot bring state actions because of ERISA preemption, then there will be no enforcement remedy. If the plan fiduciaries can maintain state claims, the plans would be subject to varying laws. State court actions may or may not be successful depending upon the jurisdictions in which the actions are brought. The various state courts may apply federal law or they may apply unique state statutes and common law. This would frustrate Congress's primary goal in enacting ERISA – *i.e.*, uniform administration of employee benefit plans, including uniform legal obligations.

Several of this Court's opinions have emphasized that Congress intended to enable employers "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits,"[46] and that such "[u]niformity is impossible, however, if plans are subject to different legal obligations in different states."[47] Moreover, plan

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suit against tortfeasor's insurer); *Palmerton v. Associates' Health and Welfare Plan*, 260 Wis 2d 179, 659 N.W. 2d 183 (Ct. App. 2003) (affirmed the award of a judgment based on state law subrogation claim to the plan); *Brodzik v. Szpakowicz*, 2002 Conn. Super. LEXIS 3417 (Sup. Ct. Conn. 2002) (approved the plan's lien and ordered it paid from the judgment); *Hamrick's Inc. v. Roy*, 115 S.W. 3d 468 (Ct App. Tenn. 2002) (affirmed the plan's judgment against the participant and her attorney in a state law suit to enforce reimbursement agreement).

[46] *Fort Halifax Packing Co. v Coyne*, 482 U.S. 1, 9 (1987).

[47] *Egelhoff v. Egelhoff*, 432 U.S. 141, 148 (2001). *See also FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) ("[t]o require plan providers to design their programs in an environment of differing state regulations

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administration would become increasingly inefficient and costly if plans are forced in each and every potential third party liability claim to go into state courts and file actions against potential liable third parties to recover advanced medical expenses.

CONCLUSION

The *Sereboff* decision (following the lead of other Circuits) was correctly decided under this Court's *Knudson* opinion. The traditional equity courts were empowered to deliver *justice* when relief at law was inadequate or not as favorable. Providing plan fiduciaries with an equitable remedy under ERISA §502(a)(3) to enforce the terms of the plan and to prevent unjust enrichment will encourage the participants to live up to their commitments, promote Congress's goal of uniformity in administration, and inevitably reduce the costs of providing health care costs.

For the above reasons, *Amici* respectfully request that this Court affirm the decision of the Court of Appeals for the Fourth Circuit.

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would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits").

Respectfully submitted,

TÉRESE M. CONNERTON, ESQ.
SCHMELTZER, APTAKER & SHEPARD, PC
2600 Virginia Ave., N.W., Suite 1000
Washington, DC 20037
(202) 333-8800

Counsel of Record

KENYA N. WILEY, ESQ.
SOCIETY FOR HUMAN RESOURCE MANAGEMENT
1800 Duke Street
Alexandria, VA 22314-3499
(703) 535-6026

STEPHEN A. BOKAT, ESQ.
ROBIN S. CONRAD, ESQ.
ELLEN DUNHAM BRYANT, ESQ.
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 563-5337

Counsel for Amici Curiae